(2)

No. 06-1004

FILED
FEB 21 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

AMBROSE MOSES, III,

Petitioner,

v.

STERLING COMMERCE (AMERICA), INC., *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

CHAD A. READLER
(Counsel of Record)
MATTHEW W. LAMPE
E. MICHAEL ROSSMAN
JONES DAY
Mailing Address:
P.O. Box 165017
Columbus, Ohio 43216
Street Address:
325 John H. McConnell Blvd., Suite 600
Columbus, Ohio 43215
(614) 469-3939

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

The petitioner in this matter raises the following issues:

1. Where the parties had consented to full magistrate adjudication under 28 U.S.C. § 636(c)(1), was it proper and lawful for the magistrate to conduct proceedings, to rule upon motions, and to dismiss the action with no district court judge assigned to the case?

2. Where the parties have consented to full magistrate adjudication under 28 U.S.C. § 636(c)(1), is it proper and constitutional for a magistrate to conduct proceedings and dismiss a case when there is no Article III judge assigned to the case?

(Pet. App. i.)

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties in the Sixth Circuit Court of Appeals were: (a) Ambrose Moses, III ("Moses"), and (b) Sterling Commerce (America) Inc., Paul L.H. Olson, Thomas Williams, Phyllis Hohe, Terry Thomas, and Melissa Coleman (collectively "Sterling Commerce").

Sterling Commerce (America), Inc. is a wholly owned subsidiary of AT&T, Inc. There is no other corporation that owns ten percent or more of Sterling Commerce (America), Inc.'s stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES iv

CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT 1

I. DISTRICT COURT PROCEEDINGS 2

II. MOSES' APPEALS AND SUBSEQUENT PROCEEDINGS 5

REASONS FOR DENYING THE WRIT 6

I. MOSES HAS NOT PRESENTED A COMPELLING ISSUE FOR REVIEW 6

II. MOSES' PETITION IS PROCEDURALLY DEFECTIVE 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Federal Cases

Arbaugh v. Y & H Corp., 546 U.S. 500 (2006).....7, 8
Bell & Beckwith v. United States, 766 F.2d 910 (6th Cir. 1985).....7
Collins v. Foreman, 729 F.2d 108 (2d Cir. 1984).....6
Commodity Futures Trading Comm'n. v. Schor, 478 U.S. 833 (1986).....6
D.L. Auld Co. v. Chroma Graphics Corp., 753 F.2d 1029 (Fed. Cir. 1985).....7
Fields v. Wash. Metro. Area Transit Auth., 743 F.2d 890 (D.C. Cir. 1984).....7
Fed. Trade Comm'n. v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206, 211 (1952).....9, 10
Gairola v. Va. Dep't of Gen. Servs., 753 F.2d 1281 (4th Cir. 1985).....7
Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037 (7th Cir. 1984).....6-7
Goldstein v. Kelleher, 728 F.2d 32 (1st Cir. 1984).....6
Lehman Bros. Kuhn Loeb, Inc. v. Clark Oil & Ref. Corp., 739 F.2d 1313 (8th Cir. 1984).....6
Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 725 F.2d 537 (9th Cir. 1984).....6, 8
Puryear v. Ede's Ltd., 731 F.2d 1153 (5th Cir. 1984).....6
Roell v. Withrow, 538 U.S. 580 (2003).....7
Sinclair v. Wainwright, 814 F.2d 1516 (11th Cir. 1987).....7, 8
United States v. Dobey, 751 F.2d 1140 (10th Cir. 1985).....7
Vitols v. Citizens Banking Co., 984 F.2d 168 (6th Cir. 1993).....7
Wharton-Thomas v. United States, 721 F.2d 922 (3d Cir. 1983).....6

TABLE OF AUTHORITIES
(continued)

Page

Constitution, Statutes & Rules

U.S. CONST. art. III, § 1 .....*passim*
28 U.S.C. § 636(c)(1).....*passim*
SUP. CT. R. 10 6
SUP. CT. R. 13 .....9, 10

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, Section 1 of the United States Constitution ("Article III") provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. CONST. art. III, § 1.

In its relevant section, the Federal Magistrates Act provides:

> Upon the consent of the parties, a full-time United States magistrate judge or a part-time United States magistrate judge who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. . . .

28 U.S.C. § 636(c)(1).

STATEMENT

This matter centers on a plaintiff's repeated and groundless attempts to have a magistrate judge disqualified from a case after the magistrate ruled against the plaintiff in a series of discovery disputes. The case presents no issues

that merit this Court's time and attention, nor does it identify a split among the courts of appeal. Sterling Commerce respectfully request that this Court deny Moses' Petition in its entirety.

I. DISTRICT COURT PROCEEDINGS

On December 17, 1999, Moses – a licensed attorney – filed a *pro se* lawsuit against Sterling Commerce. In his suit, Moses challenged Sterling Commerce's decision to terminate his employment. Moses asserted a variety of federal and state claims, including claims alleging race and sex discrimination and unlawful retaliation.

At the outset of the case, all parties consented to full magistrate jurisdiction pursuant to 28 U.S.C. § 636(c). In particular, Moses agreed that all further proceedings in this action, including trial and entry of a final judgment, would be conducted by a United States magistrate judge. On April 10, 2000, District Judge Joseph Kinneary referred this case to Magistrate Judge Norah McCann King for final disposition.

As the case progressed, Moses refused to provide even basic information and documents requested in discovery, and he refused to comply fully with his obligation to sit for deposition. When various attempts to meet and confer with Moses did not resolve the discovery disputes between the parties, Sterling Commerce filed a series of discovery motions. On November 16, 2000, Magistrate Judge King granted Sterling Commerce's first motion to compel, warning Moses that the Court would not hesitate to impose sanctions against him should he again fail to participate in discovery. On September 24, 2001, Magistrate Judge King granted Sterling Commerce's subsequent motions to compel, and she also awarded Sterling Commerce $7,106.25 in discovery sanctions against Moses.

Thereafter, Moses continued to refuse to comply with his discovery obligations. Because of this, on December 21, 2001, Sterling Commerce moved to dismiss the case.

Moses responded by initiating an effort to have Magistrate Judge King taken off the case. Specifically, on January 22, 2002, Moses asked Magistrate Judge King to assign a United States district court judge to the matter. Moses' purported reason for his request was the retirement of District Court Judge Kinneary, to whom the case was assigned prior to the referral to Magistrate Judge King. Moses also indicated that he anticipated filing motions – including a motion to vacate magistrate referral – that would require the involvement of a district court judge.

On September 17, 2002, Magistrate Judge King denied Moses' motion without prejudice, stating that he could renew it in the event he filed a motion requiring the consideration of a district judge. The Magistrate also denied Sterling Commerce's motion to dismiss, noting that Moses had produced some (but by no means all) of the court-ordered discovery. In doing so, however, Magistrate Judge King once again specifically ordered Moses to fully comply with her discovery orders.

Nevertheless, Moses did not comply. Thus, on October 18, 2002, Sterling Commerce filed a second motion to dismiss this case.

While this motion was pending, Moses' efforts to remove Magistrate Judge King from the case continued. On February 25, 2003, Moses again moved to have a district judge assigned to his case, this time directing his motion to Chief Judge Walter H. Rice. In addition, on March 6, 2003, Moses asked the district court to vacate the reference to Magistrate Judge King. Here, Moses argued that Magistrate Judge King was prejudiced against African-Americans and biased in favor of defense counsel due to "a personal,

business, or financial connection or relationship with the Jones Day law firm."

Through a random draw, Chief Judge Rice assigned Moses' motions to District Judge Edmund A. Sargus, Jr. (Pet. App. 31a.) On April 3, 2003, Judge Sargus denied both motions. Judge Sargus found that "contrary to Plaintiff's contention, when the parties consent to disposition by the Magistrate Judge, an Article III judge is no longer assigned to the case." (Pet. App. 33a.) In addition, Judge Sargus found Moses' conspiracy allegations baseless. (*Id.* ("It is clear that Plaintiff's motion is motivated by his dissatisfaction with certain rulings, which has led him to make conclusory, unsubstantiated claims of 'conspiracy' on the part of the Magistrate Judge and defense counsel.").)

On July 1, 2003, Magistrate Judge King granted Sterling Commerce's motion to dismiss Moses' case. (Pet. App. 22a.) In so doing, Magistrate Judge King outlined Moses' discovery abuses as well as the prior warnings Moses received regarding the consequences of those abuses. The magistrate concluded that "[t]his series of events demonstrates a pattern of continued refusal to fully comply with this Court's discovery orders." (Pet. App. 29a.) Magistrate Judge King also found that Sterling Commerce had been prejudiced by Moses' failure to cooperate in discovery through the expenditure of "time, money and effort in pursuit of discovery that plaintiff was legally obligated to provide." (*Id.*) Finally, Magistrate Judge King concluded that a sanction short of dismissal would be "ineffectual" – largely because Moses continued to refuse to provide court-ordered discovery even after monetary sanctions had been imposed. (Pet. App. 30a.)

In the judgment dismissing this matter, Magistrate Judge King did not specifically incorporate the monetary sanctions she had awarded to Sterling Commerce in September 2002. On July 11, 2003, Sterling Commerce filed a motion to

correct the judgment, requesting that the judgment be amended to specifically incorporate the sanctions award.

II. MOSES' APPEALS AND SUBSEQUENT PROCEEDINGS

On July 30, 2003, Moses appealed the dismissal of this case to the United States Court of Appeals for the Sixth Circuit. In this appeal, Moses argued, among other things, that: (i) Magistrate Judge King did not have jurisdiction or authority to preside over the case, because there was no district judge assigned; (ii) Chief Judge Rice erred in assigning the case to Judge Sargus to evaluate Moses' motion to vacate the reference to the magistrate judge, (iii) Judge Sargus erred in denying the motion to vacate; and (iv) Magistrate Judge King had abused her discretion in dismissing the case for discovery abuses. On January 3, 2005, the Sixth Circuit rejected Moses' arguments, affirming the decisions below. (Pet. App. 10a.)

Magistrate Judge King had stayed consideration of Sterling Commerce's motion to correct the judgment pending the outcome of Moses' appeal. On May 5, 2005, however, she granted the motion, ordering that the $7,106.25 sanctions award against Moses be expressly included in the court's judgment. (Pet. App. 7a.).

On June 6, 2005, Moses appealed the corrected judgment to the Sixth Circuit. On this appeal, Moses raised the same arguments that he made in his first appeal, including his contention that it was unconstitutional for Magistrate Judge King to conduct proceedings without a district judge assigned to the case. On August 21, 2006, the Sixth Circuit denied Moses' appeal, citing the law of the case doctrine. (Pet. App. 1a.) Following this decision, Moses requested *certiorari* from this Court.

REASONS FOR DENYING THE WRIT

I. MOSES HAS NOT PRESENTED A COMPELLING ISSUE FOR REVIEW

This Court should deny Moses' Petition in its entirety because Moses has identified no compelling reasons for this court to grant certiorari. *See* SUP. CT. R. 10 ("Review on a writ of certiorari is not a matter of right, but of judicial discretion.") To the contrary, Moses presents this Court with a narrow and limited question: in light of Moses' consent to full magistrate adjudication under 28 U.S.C. § 636(c), was the district court constitutionally or statutorily required to assign an Article III judge to this case after the retirement of District Judge Kinneary. The Sixth Circuit applied the correct rule of law in addressing this issue, and the court's decision does not conflict with the law of any other circuit.

Moses agreed to have his complaint heard by a federal magistrate. While the U.S. Constitution's Article III generally guarantees the right to a district court judge in civil litigation, this right "is subject to waiver." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 849 (1986) (noting that "personal constitutional rights that dictate the procedures by which civil . . . matters must be tried" may be waived). In this regard, 29 U.S.C. § 636(c)(1) specifically permits civil litigants to consent to magistrate resolution of "any and all proceedings." The constitutionality of this provision has been well-settled for more than twenty years. *See, e.g., Wharton-Thomas v. United States*, 721 F.2d 922, 929-30 (3d Cir. 1983); *Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.*, 725 F.2d 537, 544-47 (9th Cir. 1984) (en banc); *Goldstein v. Kelleher*, 728 F.2d 32, 34-35 (1st Cir. 1984); *Collins v. Foreman*, 729 F.2d 108, 115, 120 (2d Cir. 1984); *Puryear v. Ede's Ltd.*, 731 F.2d 1153, 1154 (5th Cir. 1984); *Lehman Bros. Kuhn Loeb, Inc. v. Clark Oil & Ref. Corp.*, 739 F.2d 1313, 1314-16 (8th Cir. 1984); *Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1045 (7th

Cir. 1984); *Fields v. Wash. Metro. Area Transit Auth.*, 743 F.2d 890, 893-94 (D.C. Cir. 1984); *United States v. Dobey*, 751 F.2d 1140, 1142-43 (10th Cir. 1985); *D.L. Auld Co. v. Chroma Graphics Corp.*, 753 F.2d 1029, 1031-32 (Fed. Cir. 1985); *Gairola v. Va. Dep't of Gen. Servs.*, 753 F.2d 1281, 1285-86 (4th Cir. 1985); *Bell & Beckwith v. United States*, 766 F.2d 910, 912 (6th Cir. 1985); *Sinclair v. Wainwright*, 814 F.2d 1516, 1519 (11th Cir. 1987).

Where a civil litigant has validly consented to magistrate adjudication under 28 U.S.C. § 636(c)(1), there is no constitutional or statutory requirement that an Article III district judge be "assigned" to the case. As this Court has affirmed, "a § 636(c)(1) referral gives the magistrate judge full authority over dispositive motions, conduct of trial, and entry of final judgment, all without district court review." *Roell v. Withrow*, 538 U.S. 580, 585 (2003); *see also Vitols v. Citizens Banking Co.*, 984 F.2d 168, 169 (6th Cir. 1993) ("Although not a 'district judge,' a magistrate judge exercises the same jurisdiction as a district judge where there is a delegation pursuant to § 636(c).").

Here, Moses consented to the referral of this case to Magistrate Judge King under 28 U.S.C. § 636(c)(1). Following this referral, the magistrate possessed "full authority" over the matter. *Roell*, 538 U.S. at 585. Thus, the district court was under no obligation to assign a district judge to the matter upon the retirement of Judge Kinneary, who presided over the case prior to the referral to Magistrate Judge King.

Moses' case law does not suggest otherwise, nor does it suggest a split in the circuits. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 126 S. Ct. 1235 (2006) (cited at Pet. 8 n.4) is inapposite. The question presented in that case was "whether the numerical qualification contained in Title VII's definition of 'employer' affects federal-court subject-matter jurisdiction or, instead, delineates a substantive ingredient of

a Title VII claim for relief." *Id.* at 1238. Although the parties had consented to magistrate adjudication under 28 U.S.C. § 636(c), *id.* at 1241, the case did not address or consider the issues that Moses presents to this Court.

Further, in *Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.*, 725 F.2d 537 (9th Cir. 1984) (cited at Pet. 7 n.3), the Ninth Circuit reviewed whether 28 U.S.C. § 636(c) unconstitutionally impaired the functioning of the judicial branch of government. Concluding that it did not, the court found significant that "[t]he statute invests the Article III judiciary with extensive administrative control over the management, composition, and operation of the magistrate system." *Id.* at 544; *cf. Sinclair*, 814 F.2d at 1519 (Eleventh Circuit decision applying similar reasoning and noting that "[a]t least nine other circuits" had previously adopted this position).

In this case, the Southern District of Ohio acted in accordance with both Article III and 28 U.S.C. § 636. Specifically, and notwithstanding Moses' complaint that no district judge was assigned to this matter following the retirement of Judge Kinneary, Moses obtained review in this matter from not one, but two, district judges. In connection with Moses' first and only motion to vacate the magistrate reference, Chief Judge Rice directed the Clerk of Court in Columbus to assign a district judge for the purpose of ruling on Moses' motion to vacate the magistrate reference and, if necessary, presiding over the case should Moses' motion to vacate be granted. The Clerk of Court immediately assigned this case to Judge Sargus. Judge Sargus then reviewed Moses' motion to vacate the magistrate reference and denied it. Moses simply has no cause to argue that Magistrate Judge King acted without district court oversight at any point.

In sum, the Sixth Circuit in this case correctly held that the district court was under no statutory or constitutional obligation to assign an Article III judge to the matter after

the retirement of Judge Kinneary. Likewise, the Sixth Circuit's resolution of this matter does not conflict with authority from any other circuit. For these reasons, this Court should deny Moses' Petition.

II. MOSES' PETITION IS PROCEDURALLY DEFECTIVE

Even if Moses had presented this Court with a compelling question – and he has not – his Petition is untimely and thus does not present an appropriate vehicle for review. This Court's rules require that petitions for certiorari be filed "within 90 days after entry of the judgment." *See* SUP. CT. R. 13. In applying this rule, this Court holds that a petitioner does not gain additional time simply because an underlying decision was modified in some non-substantial fashion. *See, e.g., Fed. Trade Comm'n. v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211 (1952) ("[T]he mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought.").

In this case, Magistrate Judge King dismissed Moses' underlying litigation on July 1, 2003. (Pet. App. 22a.) On January 3, 2005, the Sixth Circuit affirmed this decision, rejecting Moses' contention that the magistrate lacked jurisdiction or authority to preside over the case. (Pet. App. 10a.) Moses, however, did not file a timely petition for certiorari at that time.

Rather, he filed the instant Petition only after the Sixth Circuit, on August 21, 2006, affirmed on law of the case grounds Magistrate Judge King's corrected judgment entry. (Pet App. 1a.) But the magistrate's corrected judgment entry made no substantive changes to the court's prior judgment. Rather, it merely added language reflecting the fact that, two and one-half years earlier, the court had awarded sanctions against Moses. (Pet. App. 7a.) Neither this amended judgment entry nor Moses' subsequent appeal from it

afforded Moses a new clock for seeking this Court's review. *See Minneapolis-Honeywell*, 344 U.S. at 211. Therefore, Moses' present Petition does not satisfy the timing requirements of SUP. CT. R. 13, and, for this additional reason, this Court should deny Moses' Petition.

CONCLUSION

Moses' Petition should be denied.

Respectfully submitted,

CHAD A. READLER
(Counsel of Record)
MATTHEW W. LAMPE
E. MICHAEL ROSSMAN
JONES DAY
Mailing Address:
P.O. Box 165017
Columbus, Ohio 43216
Street Address:
325 John H. McConnell Blvd., Suite 600
Columbus, Ohio 43215
(614) 469-3939

February 21, 2007

Counsel for Respondents